Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

NELSON GONZALEZ,

Petitioner,

v.

THOMAS PAGE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should the court of appeals' order denying a certificate of appealability be vacated for further consideration in light of *Williams v. Taylor*, 529 U.S. ___, 120 S. Ct. 1479 (2000), where the petitioner diligently, but to no avail, sought an evidentiary hearing in the state courts on the issue of whether his trial counsel was constitutionally ineffective for failing to present an alibi defense, and the district court on habeas review did not grant an evidentiary hearing, but rather deferred to a state court finding on a mixed question of fact and law?

TABLE OF CONTENTS

Page

QUESTION PRESENTED..... i

PRAYER..... 1

OPINIONS BELOW..... 1

JURISDICTION..... 1

STATUTE INVOLVED 2

STATEMENT OF THE CASE..... 3

REASONS FOR GRANTING THE PETITION..... 7

I. THE COURT OF APPEALS' ORDER DENYING A CERTIFICATE OF APPEALABILITY SHOULD BE VACATED FOR FURTHER CONSIDERATION IN LIGHT OF *WILLIAMS v. TAYLOR*, 529 U.S. ___, 120 S. Ct. 1479 (2000)..... 7

CONCLUSION 12

TABLE OF AUTHORITIES

Page

FEDERAL CASES:

Bryant v. Scott, 28 F.3d 1411 (5th Cir. 1994) 11

Cuyler v. Sullivan, 446 U.S. 335 (1980) 10

Ford v. Wainwright, 477 U.S. 399 (1986) 10

Griffin v. Warden, 970 F.2d 1355 (4th Cir. 1992) 11

Hohn v. United States, 524 U.S. 236 (1998) 2

Jackson v. Denno, 378 U.S. 368 (1964) 10

Kimmelman v. Morrison, 477 U.S. 365 (1986) 10

Lawrence v. Armontrout, 900 F.2d 127 (8th Cir. 1990), *appeal after remand*, 961 F.2d 113 (8th Cir. 1992) 11

Lindh v. Murphy, 521 U.S. 320 (1997) 6

Miller v. Fenton, 474 U.S. 104 (1985) 10

Montgomery v. Petersen, 846 F.2d 407 (7th Cir. 1988) 11

Nix v. Whitside, 475 U.S. 157 (1986) 10

Slack v. McDaniel, 120 S. Ct. 1595 (2000) 10

Strickland v. Washington, 466 U.S. 668 (1984) 10, 11

Sumner v. Mata, 455 U.S. 591 (1982) 10

Thompson v. Keohane, 516 U.S. 99 (1995) 10

Townsend v. Sain, 372 U.S. 293 (1963) 10

Williams v. Taylor, 529 U.S. ___, 120 S. Ct. 1479 (2000) 7, 8, 9, 11

TABLE OF AUTHORITIES – Continued

Page

STATE CASES:

People v. Gonzalez, 172 Ill. 2d 558, 679 N.E.2d 383 (1997) 6

People v. Gonzalez, 284 Ill. App. 3d 1119, 708 N.E.2d 1275 (1996) (Table) 5

FEDERAL STATUTES:

28 U.S.C. § 1254 2

28 U.S.C. § 2253 10

28 U.S.C. § 2254(e) 2, 8, 9, 10

PRAYER

Petitioner Nelson Gonzalez ("Gonzalez") respectfully prays that a writ of *certiorari* issue to review the judgment and order of the Seventh Circuit.

OPINIONS BELOW

The United States Court of Appeals' order denying petitioner's request for a certificate of appealability, *Gonzalez v. Page*, No. 99-2801 (7th Cir.), is unpublished and is set forth in Appendix ("App.") A. The United States District Court's order refusing to issue a certificate of appealability, *United States ex rel. Gonzalez v. Page*, No. 98 C 2254 (N.D. Ill.) (Norgle, J.), is unpublished and is contained in App. B. The district court's opinion denying petitioner's habeas corpus petition is unpublished and is set forth in App. C. The Illinois Supreme Court's order denying Gonzalez's petition for leave to appeal is reported at 172 Ill. 2d 558, 679 N.E.2d 383 (1997) and is contained in App. D. The opinion of the Illinois Appellate Court affirming Petitioner Nelson Gonzalez's first degree murder conviction, *People v. Gonzalez*, 284 Ill. App. 3d 1119, 708 N.E.2d 1275 (1996) (Table), is unpublished and is set forth in App. E.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its order denying petitioner's request for a certificate of appealability on March 23, 2000. App. A.

This petition is timely as it has been filed within 90 days of the court of appeals' judgment. This Honorable Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). *See Hohn v. United States*, 524 U.S. 236 (1998).

STATUTE INVOLVED

Title 28, United States Code, § 2254(e) provides:

> **(e)(1)** In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
>
> **(2)** If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –
>
> **(A)** the claim relies on –
>
> **(i)** a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> **(ii)** a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> **(B)** the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no

reasonable factfinder would have found the applicant guilty of the underlying offense.

STATEMENT OF THE CASE

On June 19, 1993, Ciro Mendoza ("Ciro") went to the home of his brother, Jose Mendoza ("Jose"), around 11:30 a.m. Jose Mendoza's two roommates eventually arrived. Around 11:30 p.m., the four men went to a tavern in Chicago.

While with his brother on June 19th, Ciro consumed alcohol. Ciro later claimed that he drank a total of six beers.

Around 2:00 a.m., the four men left the bar in Jose's car which stalled at an intersection. Ciro noticed five or six individuals approach. These individuals hit the car and broke the rear window as Ciro crouched in the back seat.

Ciro saw a man he later identified as Gonzalez strike Jose with a baseball bat. Ciro maintained that he leaned out of the car and grabbed the assailant. According to Ciro, he saw the perpetrator at close range for approximately 15 seconds.

The offenders fled. In the meantime, Ciro and his companions drove Jose to a hospital. Police stopped the group. Ciro maintained that he then described his brother's assailant as a man older than 16 who was "tall,"

brown skinned with black hair and a light mustache and goatee.[1] Ciro did not describe the offender's clothing.

A week later, Jose died of blunt trauma wounds to the skull and brain.

On July 23, 1993, Ciro viewed a lineup and identified Gonzalez as his brother's killer. (Ciro and Gonzalez had no prior acquaintance.) Another man in the car, Raul Moreno, also viewed a lineup, but could not identify Gonzalez.

Gonzalez was arrested and charged with first degree murder. Prior to trial, Gonzalez's attorney filed notice of intent to raise an alibi defense. State Court Common Law Record ("CLR ") 29-30. Gonzalez's pleading stated that he was with his girlfriend at the time of the offense, and listed three alibi witnesses.

At the ensuing jury trial in the Circuit Court of Cook County, Ciro identified Gonzalez as the offender. Moreno also testified for the State, but did not identify Gonzalez. The other man in Mendoza's car, Romaldo Alvarez, did not testify. Gonzalez called two witnesses in his defense, but did not present the proffered alibi defense. The jury returned a guilty verdict.

Thereafter, Gonzalez obtained new counsel, who filed a supplemental post trial motion that alleged that Gonzalez had been denied effective assistance of trial counsel in violation of the Sixth Amendment to the

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[1] It turns out that Gonzalez is not "tall;" he stands 5'8. In addition, Gonzalez did not have a goatee when Ciro identified him at a police lineup held three weeks after the offense.

United States Constitution. CLR 90-95. Supported by the affidavits of eight individuals, the motion asserted that Gonzalez was with his child and other family members at a Father's Day weekend family gathering in Lake Point, Indiana. The motion further stated that numerous alibi witnesses were known to trial counsel and available to testify at trial.

Gonzalez requested an evidentiary hearing on his ineffective assistance of counsel claim. III State Court Transcript ("Tr.") 4-14. During oral arguments on the motion, three witnesses who had offered affidavits, as well as other witnesses, were present in court and prepared to testify. In response to defense counsel's arguments, the prosecutor noted that a State's investigator had interviewed the alibi witnesses. While the prosecutor did not disclose the contents of the interviews, he speculated that trial counsel "chose not to proceed to put these people on the stand in light of possible impeachment." *People v. Gonzalez*, 284 Ill. App. 3d 1119, 708 N.E.2d 1275 (1996) (Table); App. E-9.

The trial court refused to hold an evidentiary hearing. III Tr. 14-15. Absent foundation in testimonial evidence, the judge ruled that defense counsel's failure to call the alibi witnesses stemmed from trial strategy. *Id.*

After being sentenced to 45 years imprisonment, Gonzalez appealed to the Illinois Appellate Court. Gonzalez raised issues relating to his Sixth Amendment ineffective assistance of counsel claim. *People v. Gonzalez*, 1-95-1002, Appellant's Brief. The appellate court conceded that it did "not know trial counsel's precise reasoning for not calling the witnesses" since an evidentiary

hearing had not been held. App. E-11. Nonetheless, the appellate court affirmed the conviction on grounds that defense counsel's failure to assert an alibi defense at trial amounted to trial strategy. App. E-13.

Gonzalez filed a timely petition for leave to appeal in the Illinois Supreme Court. The petition advanced the Sixth Amendment ineffective assistance of counsel claim. *People v. Gonzalez*, No. 82537, Petition for Leave to Appeal (Ill. Sup. Ct.) ("PLA"). On April 2, 1997, the Illinois Supreme Court denied discretionary review. *People v. Gonzalez*, 172 Ill. 2d 558, 679 N.E.2d 383 (1997); App. D.

On April 27, 1998, Gonzalez filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Illinois. The Anti-Terrorism and Effective Death Penalty Act ("AEDPA") governed the petition. *See Lindh v. Murphy*, 521 U.S. 320 (1997). The petition named Thomas Page, the Warden of the Menard, Illinois Correctional Center, as the respondent.

While the district court considered Gonzalez's ineffective assistance of counsel claim on the merits, it did not grant Gonzalez's request for an evidentiary hearing. *See United States ex rel. Gonzalez v. Page*, No. 98 C 2254, Opinion and Order (N.D. Ill. 1999) (Norgle, J.); App. C. In denying Gonzalez's habeas corpus petition, the district court found "no error with the Illinois Appellate Court's findings that counsel's decision not to have any alibi witnesses was a strategic one well within reasonable limits." App. C-8.

Gonzalez filed a timely notice of appeal. Thereafter, the district court denied a certificate of appealability. App. B.

On March 23, 2000, the Seventh Circuit, in an order entered by two judges, denied Gonzalez's application for a certificate of appealability. *Gonzalez v. Page*, No. 99-2801 (7th Cir.); App. A. The Seventh Circuit's mandate issued on April 14, 2000.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS' ORDER DENYING A CERTIFICATE OF APPEALABILITY SHOULD BE VACATED FOR FURTHER CONSIDERATION IN LIGHT OF *WILLIAMS v. TAYLOR*, 529 U.S. ___, 120 S. Ct. 1479 (2000)

No physical evidence connected Petitioner Nelson Gonzalez to Jose Mendoza's murder. Rather, Gonzalez was convicted on the flimsiest of evidence, i.e., the testimony of a single, biased witness (Ciro Mendoza) who had a circumscribed opportunity to observe. Specifically, Ciro, the brother of the murder victim, consumed alcohol over a period of 14 hours before observing the offense. Ciro's actual observation of the face of his brother's killer occurred over a mere 15 seconds, and was impaired given that the offense occurred at night under stressful circumstances. Ciro had no prior acquaintance with, or knowledge of, Gonzalez. The description Ciro claimed that he gave the police on the night of the offense was limited, and did not even match Gonzalez's physical characteristics. Ciro did not identify Gonzalez until he viewed a police lineup held three weeks after the offense.

Against this, Gonzalez had access to substantial alibi evidence. Eight witnesses were available to testify that

Gonzalez had spent the weekend over which the murder occurred in another state, miles away from the crime scene. Although these individuals were known to Gonzalez's trial counsel, some of them were not listed on Gonzalez's pretrial answer to discovery, and none of them were called as witnesses at Gonzalez's jury trial. The reasons for counsel's failure to present the alibi defense are unknown.

When Gonzalez first pursued an ineffective assistance of counsel claim in the state trial court, he sought an evidentiary hearing. III Tr. 4-14. The trial judge, however, refused to grant an evidentiary hearing. III Tr. 14-15. Absent Gonzalez's trial counsel having testified about the reasons for not pursuing an alibi defense, the trial judge concluded that counsel's failure to present an alibi defense constituted a matter of "strategy." *Id.* Since then, two courts (the Illinois Appellate Court on direct review and the United States District Court on habeas review) have examined the merits of Gonzalez's claim and have deferred the trial court's speculative belief that "strategy" dictated counsel's failure to call alibi witnesses. *See* App. C-8; App. E-12, 13.

After the Seventh Circuit denied Gonzalez's application for a certificate of appealability and issued its mandate, but before the time for the filing of a *certiorari* petition expired, this Honorable Court handed down its unanimous decision in *Williams v. Taylor*, 529 U.S. ___, 120 S. Ct. 1479 (April 18, 2000). In *Williams v. Taylor*, the Court considered the circumstances under which a habeas corpus petitioner is entitled to an evidentiary hearing. This Court noted that pursuant to 28 U.S.C. § 2254(e)(2) a

habeas petitioner cannot be granted an evidentiary hearing if he "failed to develop the factual basis of a claim in State court proceedings" (and does not meet the other stringent statutory requirements (not applicable here)). This Court, however, determined that § 2254(e)(2)'s prohibition against evidentiary hearings does not apply if the habeas petitioner diligently requested an evidentiary hearing in the state court.

Williams v. Taylor underscores that the district court should not have denied Gonzalez's habeas petition absent an evidentiary hearing. Gonzalez diligently sought an evidentiary hearing on his ineffective assistance of counsel claim in the state court. III Tr. 4-14. The state trial judge, however, spurned Gonzalez's request for an evidentiary hearing. III Tr. 14-15. On appeal, Gonzalez reasserted his request for an evidentiary hearing. *People v. Gonzalez*, 1-95-1002, Appellant's Brief, p. 28. Further, in his petition for discretionary review filed in the Illinois Supreme Court, Gonzalez again moved for an evidentiary hearing, phrasing the issue presented for review as follows: A defendant who claims that his trial lawyer refused to call alibi witnesses in his behalf, and whose claim is supported by affidavit of the witnesses, is entitled to an evidentiary hearing to develop the facts and demonstrate prejudice to him. PLA, pp. 3, 7 & 10. The United States District Court, too, did not hold an evidentiary hearing. Rather, the district judge simply deferred to the Illinois Appellate Court's finding that Gonzalez's trial counsel had rendered effective assistance of counsel because the decision not to call alibi witnesses amounted to trial strategy. App. C-8.

The district court clearly erred in denying Gonzalez's habeas corpus petition absent an evidentiary hearing. This Court has held that "in a federal habeas challenge to a state criminal judgment, a state court conclusion that counsel rendered effective assistance is not a finding of fact binding on the federal court."[2] *Strickland v. Washington*, 466 U.S. 668, 697 (1984). *See also Kimmelman v. Morrison*, 477 U.S. 365, 388-89 (1986); *Cuyler v. Sullivan*, 446 U.S. 335, 342 (1980); *Nix v. Whitside*, 475 U.S. 157, 182-83 (1986) (Blackmun, J., concurring). Absent the state court having held an evidentiary hearing, and absent the district court itself having held an evidentiary hearing, the district judge simply lacked a foundation upon which to conclude that trial counsel's decision not to present an alibi defense was a matter of "strategy." *Cf. Ford v. Wainwright*, 477 U.S. 399, 410 (1986); *Townsend v. Sain*, 372 U.S. 293 (1963).

A habeas petitioner is entitled to a certificate of appealability when the petition raises a substantial constitutional question. 28 U.S.C. § 2253(c)(2). *See also Slack v. McDaniel*, 529 U.S. ___, 120 S. Ct. 1595 (2000). Here, the facts as alleged in Gonzalez's habeas corpus petition raise a substantial violation of the Sixth Amendment within

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[2] This proposition derives from the greater rule that state court findings on mixed questions of fact and law are not presumed correct on federal habeas review. *See Thompson v. Keohane*, 516 U.S. 99 (1995); *Miller v. Fenton*, 474 U.S. 104 (1985); *Sumner v. Mata*, 455 U.S. 591 (1982); *Jackson v. Denno*, 378 U.S. 368 (1964). The AEDPA did not alter this rule. Title 28, United States Code, § 2254(e)(1) only accords a presumption of correctness to factual findings, and does not address mixed questions.

the meaning of *Strickland v. Washington*. Indeed, the law is clear that defense counsel's failure to investigate and present an alibi defense constitutes ineffective assistance of counsel.[3] When the substantial nature of the constitutional question presented in Gonzalez's habeas petition is coupled with the error inherent in the district court's failure to grant an evidentiary hearing, Gonzalez has clearly met the standard for issuance of a certificate of appealability. Accordingly, the Seventh Circuit's order denying Gonzalez's application for a certificate of appealability should be vacated and the cause remanded for further consideration in light of *Williams v. Taylor*, 529 U.S. ___, 120 S. Ct. 1479 (2000).

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[3] *See, e.g., Bryant v. Scott*, 28 F.3d 1411, 1418 (5th Cir. 1994); *Griffin v. Warden*, 970 F.2d 1355, 1358-59 (4th Cir. 1992); *Lawrence v. Armontrout*, 900 F.2d 127, 129-30 (8th Cir. 1990), *appeal after remand*, 961 F.2d 113 (8th Cir. 1992); *Montgomery v. Petersen*, 846 F.2d 407, 415-16 (7th Cir. 1988).

CONCLUSION

WHEREFORE, Petitioner Nelson Gonzalez respectfully prays that this Honorable Court grant this petition and issue a writ of *certiorari* to vacate or review the judgment of the Seventh Circuit, remand for further consideration and/or grant any other appropriate relief.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted March 22, 2000
Decided March 23, 2000

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. JOEL M. FLAUM, *Circuit Judge*

No. 99-2801

NELSON GONZALEZ,	Appeal from the
Petitioner-Appellant,	United States District Court
v.	for the Northern District of Illinois, Eastern Division
THOMAS F. PAGE,	No. 98 C 2554
Respondent-Appellee.	Charles R. Norgle, Sr.,
	Judge.

ORDER

Nelson Gonzalez filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The district court denied the petition and declined to issue a certificate of appealability. Gonzalez now has filed an application for certificate of appealability.

This court has reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED.

APPENDIX B

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge or Magistrate Judge
CHARLES R. NORGLE
Sitting Judge if Other Than Assigned Judge
Case Number 98 C 2554
Date July 15, 1999
Case Title Gonzales v. Page

* * *

(10) [X] [Other docket entry]

The clerk has informed the court that Petitioner has filed a Notice of Appeal in this action. For the reasons stated on the reverse side of this order, the court concludes that a certificate should not issue.

/s/ Charles Norgle Sr.

(11) [X] [For further detail see [X] order on the reverse of [ ] order attached to the original minute order form.]

[ ] No notices required, advised in open court.

[ ] No notices required.

[ ] Notices mailed by judge's staff.

[ ] Notified counsel by telephone.

[X] Docketing to mail notices.

[ ] Mail AO 450 form.

[ ] Copy to judge/magistrate Judge.

* * *

(Reserved for use by the Court)

ORDER

Federal Rule of Appellate Procedure 22(b) states, in relevant part:

> In a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of appealability pursuant to section 2253(c) of title 28, United States Code.

Fed. R. App. P. 22(B). Federal Rule of Appellate Procedure 22(b) and Circuit Rule 22.1 require a court to either issue a certificate of appealability ("certificate") or state the reasons why such a certificate should not issue. "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C § 2253(c)(2).

"[T]he new § 2253 does not make it substantively more difficult to get a [certificate] than it was to get a [certificate of probable cause]." *Porter v. Gramely*, 112 F.3d 1308, 1312 (7th Cir. 1997). The petitioner must still demonstrate that the "issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983) (alteration in original) (citations and internal quotation marks are omitted); *see also Porter*, 112 F.3d at 1312.

On February 10, 1995, Gonzales was found guilty of first-degree murder. In Gonzales' petition for habeas relief, he

argued (1) that he received ineffective assistance of counsel at trial because his cousel [sic] failed to elicit alibi testimony and (2) that the prosecution presented insufficient evidence to sustain his conviction. On April 29, 1999, the court dismissed Petitioner's habeas petition. Specifically, with regard to Gonzales' first argument, the court found that Gonzales' counsel spoke to many of the potential affiants before and during the trial, was aware of their potential testimony, and could assess the possibility of impeachment. Consequently, the court held that trial counsel's choice to exclude alibi witness testimony from Gonzales' case was a reasonable, strategic one. *See United States v. Monigan*, 128 F.3d 609, 612 (7th Cir. 1997); *see also United States v. Williams*, 106 F.3d 1362, 1367 (7th Cir. 1997) ("A lawyer's decision to call or not to call a witness is a strategic decision generally not subject to review."); *Lewis v. Lane*, 832 F.2d 1446, 1462 (7th Cir. 1987); *Emerson v. Gramley*, 883 F.Supp. 225, 239 (N.D. Ill. 1995) (holding that it was not unreasonable for a trial attorney to avoid alibi witnesses given their close relationship with the accused and the weakness of their proffered testimony).

With regard to Gonzales' second argument, the court found that the prosecution presented sufficient evidence to sustain Gonzales' conviction. The court found that the Illinois Appellate Court, viewing the evidence in a light most favorable to Gonzales (*see Jackson v. Virginia*, 443 U.S 307, 318-319 (1979)), explained the manner in which the witness viewed the assailant at the crime scene, found the witness's identification testimony to be credible, and acknowledged (but dismissed) the possibility of the witness's intoxication. *See People v. Goodloe*, 636 N.E.2d 1041

(Ill. App. 1994) (holding that testimony of a single witness is sufficient to support a conviction); *People v. Curtis*, 635 N.E.2d 860 (Ill.App. 1994). Accordingly, the court held that Gonzales failed to demonstrate that the Illinois Appellate Court's application of the *Jackson* standard was an unreasonable application of federal law and denied his petition for habeas corpus.

The court's denial of Gonzales' § 2254 petition was based on well settled law. Gonzales has made no showing of a constitutional violation. Therefore, the court sees no reason for the instant case to proceed. Thus, the certificate is denied.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

United States of America ex rel., NELSON GONZALEZ, Petitioner,	)	No. 98 C 2554
	)	HONORABLE CHARLES R. NORGLE
v.	)	
THOMAS PAGE, Respondent.	)	

OPINION and ORDER

CHARLES R. NORGLE, SR., District Judge:

Before the court is Nelson Gonzales' petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Gonzales asserts that he was denied effective assistance of trial counsel and that the prosecution presented insufficient evidence to sustain his conviction. For the following reasons, the court denies the petition.

I. BACKGROUND[1]

At about 2:00 a.m. on June 20, 1993, Jose Mendoza ("Mendoza") was beaten to death in Chicago by a man with a baseball bat. Petitioner Nelson Gonzales

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[1] Because Gonzales does not contest the statement of facts set forth in the unpublished opinion of the Illinois Appellate Court, those facts are presumed true, and the court adopts them here. *See* 28 U.S.C. § 2254(e)(1) (1997); *Kelley v. Gilmore*, No. 96 C 5586, 1997 WL 529555, at *1 (N.D. Ill. Aug. 18, 1997).

("Gonzales") was arrested and charged with first-degree murder. On February 10, 1995, a jury in the Circuit Court of Cook County found Gonzales guilty of the charge. After the trial, Gonzales' counsel filed a post-trial motion, arguing that the prosecution presented insufficient evidence to establish Gonzales' guilt beyond a reasonable doubt. Dissatisfied with the performance of his counsel, Gonzales retained new counsel.[2] Gonzales then filed a supplemental post-trial motion, arguing ineffective assistance of counsel at trial. The circuit court denied both post-trial motions and sentenced Gonzales to 45 years of imprisonment. Gonzales is currently in the custody of Respondent, Thomas Page ("Page"), the warden of Menard Correctional Center in Menard, Illinois.

Gonzales appealed his conviction to the Illinois Appellate Court and again raised the issues of insufficient evidence to convict and ineffective assistance of counsel. On September 27, 1996, the Illinois Appellate Court affirmed the judgment of the trial court. (*See* Answer, Ex. A.) Gonzales then filed a motion for rehearing with the Illinois Appellate Court. On November 27, 1996, the appellate court denied Gonzales' motion (*See* Answer, Ex. B.)

Subsequently, Gonzales timely sought leave to appeal to the Illinois Supreme Court. His petition alleged only that the Illinois Appellate Court should have remanded his case to the trial court for an evidentiary hearing on his claim of ineffective assistance of counsel. On April 2,

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[2] Unless otherwise noted, "counsel" refers to Gonzales' trial counsel.

1997, the Illinois Supreme Court denied the petition. (*See* Answer, Ex. C.) Gonzales did not file a petition for a writ of certiorari to the United States Supreme Court.

On April 27, 1998, Gonzales filed the instant petition for writ of habeas corpus. Gonzales argues that he received ineffective assistance of counsel at trial, and that the prosecution presented insufficient evidence to sustain his conviction. On June 9, 1998, Page moved to dismiss the petition as time-barred, alleging that it was filed beyond the one-year period of limitation provided by 28 U.S.C. § 2244. In his motion, Page asserted that the one-year limitation began on April 2, 1997, the day the Illinois Supreme Court denied Gonzales' petition for leave to appeal. Thus, Page argued, the April 27, 1998 filing of Gonzales' habeas petition fell outside of § 2244's one-year limitation. On August 3, 1999, the court denied Page's motion. (*See* Order dated August 3, 1998.) In its order, the court stated that § 2244's one-year limitation period did not begin to run until the time for Gonzales to appeal to the United States Supreme Court expired, that is, 90 days after the Illinois Supreme Court denied his petition for leave to appeal. (*See id.*) Thus, because Gonzales filed his habeas petition within 90 days after the Illinois Supreme Court denied his petition for leave to appeal, the court found that Gonzales timely filed his habeas petition. (*See id.*)

Consequently, on September 10, 1998, Page answered the petition. In his Answer, Page raises no procedural default arguments, and he acknowledges that Gonzales has exhausted his state court remedies. Page also concedes that the current law in the Seventh Circuit permits Gonzales to raise his insufficient evidence claim in his

federal habeas petition even though he did not include this claim in his petition for leave to appeal to the Illinois Supreme Court (*see Boerckel v. O'Sullivan*, 135 F.3d 1194, 1198-1202 (7th Cir. 1997)); the United States Supreme Court, however, has granted a writ of certiorari limited to the following question: "May an individual who is in custody pursuant to a state criminal conviction pursue claims in a federal habeas petition if those claims were not raised on direct appeal in a petition for discretionary review to the state's highest court?" *O'Sullivan v. Boerckel*, 119 S.Ct. 508 (Nov. 16, 1998). Thus, the court addresses Gonzales' two arguments: that Gonzales' claims of ineffective assistance of counsel and insufficient evidence to sustain his conviction should be denied on their merits.

II. DISCUSSION

As a preliminary matter, the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-32, 110 Stat. 1219 (1996) ("AEDPA") went into effect on April 24, 1996. Because Gonzales filed his habeas petition on April 27, 1998, the court reviews his petition under the strict standards of the AEDPA. Section § [sic] 2254(d) of the AEDPA provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as

> determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (1996).

The "contrary to" clause of § 2254(d)(1) applies solely to questions of law. *See Lindh v. Murphy*, 96 F.3d 856, 869 (7th Cir. 1996), *rev'd on other grounds*, ___U.S.___, ___, 117 S.Ct. 726 (1997). It requires federal courts "to give state courts' opinions a respectful reading, and to listen carefully to their conclusions, but when the state court addresses a legal question, it is the law as determined by the Supreme Court of the United States that prevails." *Id.* In contrast, the "unreasonable application" clause of § 2254(d)(1) applies to mixed question of law and fact. *Id.* at 870. It "restricts the grant of collateral relief to cases in which the state's decision reflects 'an unreasonable application of' the law" to the facts. *Id.* With these principles in mind, the court turns to the merits of Gonzales' claims.

A. Ineffective Assistance of Counsel

Gonzales asserts that he was denied effective assistance of counsel in violation of the Sixth Amendment because his attorney declined to call alibi witnesses who were available and willing to testify. To establish a claim for ineffective assistance of counsel, Gonzales must demonstrate that: (1) his counsel's performance fell below an objective standard of reasonableness, (*see Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)); and (2) "there is

a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

To satisfy the first prong of the *Strickland* test, the performance element, Gonzales must identify the acts or omissions of counsel that form the basis of his ineffective assistance claim. *See id.*, at 690. The court must then decide whether, in light of all the circumstances, the identified acts or omissions fell outside the wide range of professionally competent assistance. *See id.* Judicial scrutiny of counsel's performance is highly deferential, and a court must presume reasonable judgment on the part of trial counsel. *See id.*, at 689; *see also United States v. Williams*, 106 F.3d 1362, 1367 (7th Cir. 1997). Thus, Gonzales "bears a heavy burden when seeking to establish an ineffective assistance of counsel claim." *Jones v. Page*, 76 F.3d 831, 840 (7th Cir. 1996) (*quoting Drake v. Clark*, 14 F.3d 351, 355 (7th Cir. 1994)).

In the case at bar, eight individuals, including several members of Gonzales' family, signed affidavits declaring that Gonzales attended a family gathering in Lake Station, Indiana on the weekend of Mendoza's murder. One affiant, Henry Torres, stated that he slept in the same room as Gonzalez the night of Mendoza's murder, and when Torres awoke the next morning, Gonzales was in the room (*See* Pet., Ex. A, Aff. 1.) However, none of the potential witnesses, including Torres, actually saw him in

Indiana at 2:00 a.m. on June 20, 1993, the approximate time of Mendoza's murder in Chicago.[3]

Furthermore, as part of Gonzales' answer to discovery, counsel filed a pretrial notice of alibi defense that asserted that at the time of the murder, Gonzales was with his girlfriend. The Illinois Appellate Court rejected this assertion:

> We note again that as part of his answer to discovery, trial counsel filed a notice of alibi defense asserting that at the time of the crime, the defendant was with his girlfriend. The affidavits supplementing the post-trial motion each averred that the affiant had told trial counsel that the defendant was with his son and the family in Lake Station, Indiana at the time of the crime. Although some of the affiants identify their familial relationship to the defendant, there is no affidavit submitted by anyone purporting to be his girlfriend.

(*See* Answer, Ex. B, at 13.)

Moreover, counsel spoke to five of the affiants before the trial (*see* Pet., Ex. A, Affs. 4-8) and to a majority of the affiants on a daily basis during the trial. (*See* Answer, Ex. B, at 9.) Thus, counsel was aware of the substance of the alibi witnesses' proposed testimony before the trial and could assess the alibi witnesses' credibility. Counsel could also assess the possibility of impeachment because

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[3] The court notes that Lake Station, Indiana lies in northwest Indiana less than a mile from Interstate 80, approximately 15 miles east of the Illinois/Indiana border, and approximately five miles east of Gary, Indiana.

he knew that investigators for the prosecution had interviewed all of the potential witnesses. In light of these facts, counsel may have determined that the alibi testimony was weak and potentially damaging.

Thus, the court finds no error with the Illinois Appellate Court's findings that counsel's decision not to have any alibi witness testify was a strategic one well within reasonable limits. *See United States v. Monigan*, 128 F.3d 609, 612 (7th Cir. 1997); *see also United States v. Williams*, 106 F.3d 1362, 1367 (7th Cir. 1997) ("A lawyer's decision to call or not to call a witness is a strategic decision generally not subject to review."); *Lewis v. Lane*, 832 F.2d 1446, 1462 (7th Cir. 1987); *Emerson v. Gramley*, 883 F.Supp. 225, 239 (N.D. Ill. 1995) (holding that it was not unreasonable for a trial attorney to avoid alibi witnesses given their close relationship with the accused and the weakness of their proffered testimony). The state court's holding that under *Strickland*, the affidavits do not overcome the "strong presumption" in favor of counsel's competence (*see* Answer, Ex. B, at 14), was not contrary to, nor did it involve an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. Accordingly, the court denies Gonzales' petition under the AEDPA.

B. Insufficient Evidence to Convict

Gonzales also argues that the testimony of a single, identifying witness, Ciro Mondoza ("Ciro"), the brother of the victim, provided insufficient evidence to support the verdict. Gonzales argues that the identification was faulty because Ciro had consumed alcohol prior to the

crime, only viewed the assailant for fifteen seconds at night, and had no prior familiarity with the victim. Gonzales also refers to the lack of physical evidence linking him to the crime to support his innocence.

A federal court sitting in collateral review of a state conviction addresses sufficiency of the evidence claims under the standard established in *Jackson v. Virginia*, 443 U.S. 307 (1979). "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319. The Seventh Circuit recently described the inquiry as follows:

> Because *Jackson* claims are mixed questions of law and fact, we are compelled to hold that a writ of habeas corpus may be issued for evidence insufficiency only if the state courts have unreasonably applied the *Jackson* standard. Federal review of these claims therefore now turns on whether the state court provided fair process and engaged in reasoned, good-faith decision making when applying *Jackson*'s "no rational trier of fact" test.

Gomez v. Acevedo, 106 F.3d 192, 199 (7th Cir.1996), *vacated on other grounds*, ___U.S.___, 118 S.Ct. 37 (1997).

In the case at bar, the Illinois Appellate Court examined Gonzales' sufficiency of the evidence claim under the *Jackson* standard: whether the evidence, considered in a light most favorable to the prosecution, could reasonably support a finding of guilt beyond a reasonable doubt. (*See* Answer, Ex. B, at 5.) (*citing Jackson*, 443 U.S. at 318-319). The court noted that "[t]he testimony of a single

eyewitness may support a conviction beyond a reasonable doubt if the witness observed the defendant under circumstances indicating the reliability of the identification." *Id.* (*citing People v. Goodloe*, 636 N.E.2d 1041 (Ill. App. Ct. 1994)). Further, the court stated that as long as such evidence is admissible, a conviction may rest upon it, and the courts defer to the credibility determination of the jury, *see id.* (*citing People v. Curtis*, 635 N.E.2d 860 (Ill. App. Ct. 1994)), unless the proof "is so unsatisfactory, improbable or implausible as to justify a reasonable doubt of the defendant's guilt." *Id.* (*quoting People v. Slim*, 537 N.E.2d 317 (Ill.App.Ct. 1989)). Finally, when evaluating the identification testimony, the appellate court examined the following factors: (1) the witness's opportunity to view the defendant at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the accused; (4) the level of certainty about the identification; and (5) the length of time between the identification and the crime. *See id.* at 5-6 (*citing Curtis*, 635 N.E.2d at 865).

Upon review of the evidence, the appellate court stated, in relevant part:

> Ciro was at the crime scene. He saw the events at close range under reasonably good lighting conditions. In fact, he came into physical contact with the defendant by grabbing his arm. He identified the defendant just three weeks after the crime and did not waiver [sic] in his certainty. Although the defendant is not "tall" (he is 5' 8"), mere discrepancies in height and weight, standing alone, do not render an identification unreliable. *Curtis*, 262 Ill. App. 3d at 876; *People v. Ford*, 195 Ill. App. 3d 673, 676, 553

N.E.2d 33 (1990). Furthermore, because Ciro was crouching in the back seat of the victim's car, the defendant standing outside, may well have appeared tall.

* * *

The defendant also contends that Ciro failed to offer many specific details about the defendant's appearance, including how he was dressed at the time of the murder; however, this is also explained by the fact that Ciro was inside of a car and the defendant outside. Here, Ciro offered a general description and expressed utter certainty in his identification of the defendant from the line-up, as well as in court. Under such circumstances, the failure to offer specific details of a defendant's appearance does not undermine an identification. Certainly, there is always a danger in permitting a single witness to convict a defendant, but the law permits it, and this case does not share the weakness of those cases the defendant cites. This court has upheld identification testimony under less auspicious circumstances. . . .

* * *

The defendant asserts, finally, that Ciro was likely – given the day-long drinking – intoxicated and that this undermined the reliability of his identification; however, that Ciro was drinking merely reflects upon his credibility as a witness, a matter for the finder of fact. [citation omitted]. In any event, there is no substantive evidence in the record to support the assertion that Ciro was intoxicated at the time of the crime. In fact, officer Sierra testified that Ciro was able to drive without weaving from the scene where police stopped the victim's car. We

> conclude that Ciro's identification testimony was sufficiently reliable to support the jury's determination of guilt.

(*See* Answer, Ex. B, at 6-8.)

The above summary of the appellate court's reasoning and findings demonstrates that the appellate court reasonably and accurately applied the *Jackson* standard. The appellate court explained the manner in which the witness viewed the assailant at the crime scene, found Ciro's identification testimony to be credible, and acknowledged (but dismissed) the possibility of Ciro's intoxication. In short, the appellate court reviewed the facts and discounted Gonzales' arguments that Ciro improperly identified Gonzales as the murderer. Thus, Gonzales fails to demonstrate that the Illinois Appellate Court's application of the *Jackson* standard is an unreasonable application of federal law to the facts of the case at bar. Accordingly, this court denies Gonzales petition for habeas corpus relief under the AEDPA.

III. CONCLUSION

For the foregoing reasons, the court denies Gonzales' petition for a writ of habeas corpus. IT IS SO ORDERED.

ENTER:
/s/ Charles Ronald Norgle, Sr.
CHARLES RONALD
NORGLE, SR., Judge
United States District Court

DATED: 5-5-99

United States District Court

Northern District of Illinois
Eastern Division

U.S.A. ex rel.
NELSON GONZALES

v.

THOMAS PAGE

JUDGMENT IN A CIVIL CASE

Case Number: 98 C 2554

❑ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that the petition of Nelson Gonzales for writ of habeas corpus is denied.

Michael W. Dobbins,
Clerk of Court
/s/ Eric Fulbright
Eric Fulbright, Deputy Clerk

Date: 5/5/1999

APPENDIX D

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK

82537

SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

April 2, 1997

Mr. Edward M. Genson
Genson, Steinback, Gillespie & Martin
53 West Jackson Boulevard, Suite 1420
Chicago, IL 60604

No. 82537 – People State of Illinois, respondent, v. Nelson Gonzalez, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on April 24, 1997.

APPENDIX E

1-95-1002

SIXTH DIVISION
SEPT 27, 1996

1-95-1002

NOTICE

The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

IN THE
ILLINOIS APPELLATE COURT
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court Cook County.
Plaintiff-Appellee,	)	93 CR 18247
v.	)	The Honorable Michael P. Toomin, Judge Presiding.
NELSON GONZALES,	)	
Defendant-Apellant.	)	

ORDER

A jury found the defendant, Nelson Gonzales, guilty of the first decree murder of Jose Mendoza. The State's case rested almost exclusively upon the identification testimony of the victim's brother, Ciro Mendoza, who was present when his brother was killed. The defendant now challenges the sufficiency of the evidence upon which he as convicted and asserts that his trial attorney

was ineffective for failing to present the testimony of several alibi witnesses.

According to Ciro Mendoza, on June 19, 1993, he went to the victim's home at around 11:30 a.m., to help him with some gardening. Around 5:30 p.m., two friends, Raul Moreno and Romaldo Alvarez, who lived with the victim, arrived. The four men began drinking. Between noon and 11:30 p.m., Ciro drank about four cans of beer. Around 11:30 p.m., the group went to a bar located near California and Milwaukee Avenues. They went to the bar in the victim's car. They arrived at around midnight and stayed [sic] 2:00 a.m. During that time, Ciro consumed two additional beers.

The victim drove the group home. Raul and Ciro were in the back seat. The car stalled at the corner of Kostner and Cortland. At this time, Ciro saw five or six individuals approaching the car. They started hitting the car, breaking the rear window. The area was lighted by street lamps. Ciro crouched in the back seat, observing the events as they unfolded over the next ten minutes.

Ciro saw the defendant's face for about fifteen seconds at close range. He watched as the defendant struck the victim in the head with a baseball bat. As this occurred, Ciro leaned out of the car and grabbed the defendant's arm, pulling his head and arm into the car. At this point, Ciro was two feet from the defendant's face. As he grabbed the defendant, Ciro sensed something fall from the defendant's wrist. Eventually, the defendant and his cohorts fled, getting into a red car and driving away. Ciro placed his brother in the passenger seat and told Raul to drive to the hospital. The group was

stopped by police on the way to the hospital. Ciro gave police a description of his brother's assailant: a man older than 16 who was tall and brown skinned with black hair, a light mustache and a goatee. Ciro also later told police that he thought he had scratched the assailant's hand and that a watch that police later found in the victim's car might be the object that fell from the defendant's wrist.

The police called for an ambulance. Jose Mendoza died a week later of blunt trauma wounds to the skull and brain. At the time he was admitted to the hospital his blood-alcohol level was .38.

On June 23, 1993, the police showed Ciro some mug shot books, but Ciro could not identify anyone in the books. On July 13, Ciro viewed a line-up and identified the defendant as his brother's assailant. Ciro also identified the defendant at trial.

Raul Moreno testified that he and Romaldo Alvarez lived in the victim's basement. He confirmed that he had been at the victim's drinking on June 19. He drank heavily that day. On the way home from the bar, Raul fell asleep in the back seat of the car. He was awakened by the sound of breaking glass. He confirmed Ciro's account of the events, but could not identify the defendant from the line-up.

Alvarez was not available as a witness.

Officer Alex Sierra testified that he and his partner stopped Mendoza's car on the night of the murder because the car was being driven erratically (by Moreno). Officer Sierra directed Ciro to follow the ambulance to the hospital. Sierra noted that Ciro was not weaving as he

drove. Sierra did not fill out a report of the incident because he was en route to another call at the time.

Before trial, in an answer to a discovery request, the defendant's trial counsel had asserted an alibi defense: the defendant was at his girlfriend's at the time of the crime. The defendant presented only two witnesses, neither of whom provided him with an alibi. Jerline Howard lived near the intersection of Kostner and Cortland. She had known the defendant's family for twelve years as they lived across the street from her. She stated that on June 20, 1993 between 2:00 or 3:00 a.m., she did not hear anything unusual. However, she admitted that she did not stay up past midnight. Also, she testified that there were no street lights at Kostner and Cortland; however, the State impeached this testimony by showing her a picture of the intersection which depicted the presence of street lights.

Jose Rivera also lived at the intersection of Kostner and Cortland. He also had known the defendant and his family for several years. Rivera and his wife were sleeping in the basement of their house, which made it difficult to hear things outside. Nonetheless, he testified that he and his wife did not hear anything unusual on June 20, 1991 [sic], between 2:00 and 3:00 a.m.

The jury found the defendant guilty on this evidence. The defendant challenges the conviction on the ground that Ciro's testimony was not sufficiently reliable to support the identification of the defendant as the offender.

In reviewing the sufficiency of the evidence, the court examines the record in a light most favorable to the prosecution to determine whether any rational trier of

fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979). The testimony of a single eyewitness may support a conviction beyond a reasonable doubt if the witness observed the defendant under circumstances indicating the reliability of the identification. *People v. Goodloe*, 263 Ill. App. 3d 1060, 636 N.E.2d 1041 (1994). As long as such evidence is admissible (and the defendant does not challenge that), a conviction may rest upon it, and we defer to the credibility determination of the jury in this regard (*People v. Curtis*, 262 Ill. App. 3d 876, 881, 635 N.E.2d 860 (1994)), unless the proof "is so unsatisfactory, improbable or implausible as to justify a reasonable doubt of the defendant's guilt." *People v. Slim*, 127 Ill. 2d 302, 307, 537 N.E.2d 317 (1989).

In so evaluating identification testimony, the court examines the following factors: (1) the witness' opportunity to view the defendant at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the accused; (4) the level of certainty about the identification; and (5) the length of time between the identification and the crime. *People v. Curtis*, 262 Ill. App. 3d at 881.

We believe Ciro's identification of the defendant sufficiently satisfies these factors so as to support the jury's determination of the defendant's guilt. Ciro was at the crime scene. He saw the events at close range under reasonably good lighting conditions. In fact, he came into physical contact with the defendant by grabbing his arm. He identified the defendant just three weeks after the crime and did not waiver [sic] in his certainty. Although

the defendant is not "tall" (he is 5'8"), mere discrepancies in height and weight, standing along, do not render an identification unreliable. *Curtis*, 262 Ill. App. 3d at 876; *People v. Ford*, 195 Ill. App. 3d 673, 676, 553 N.E.2d 33 (1990). Furthermore, because Ciro was crouching in the back seat of the victim's car, the defendant, standing outside, may well have appeared tall.

Nonetheless, the defendant cites several cases in which convictions have been reversed due to insufficient identification evidence; however, they are far removed from this case. For instance, in *People v. Dowaliby*, 221 Ill. App. 3d 788, 800, 582 N.E.2d 1243 (1991), the court found a distant, nighttime identification of a person who had a nose like the defendant's insufficient to sustain a conviction. In *People v. Ford*, 195 Ill. App. 3d at 676-77, an undercover police officer's identification of the defendant was held unreliable where the officer did not describe important distinguishing characteristics of the defendant's face, namely severe scarring. Also, the officer neglected to mention the defendant's wearing of a skull cap.

The defendant also contends that Ciro failed to offer many specific details about the defendant's appearance, including how he was dressed at the time of the murder; however, this is also explained by the fact that Ciro was inside of a car and the defendant outside. Here, Ciro offered a general description and expressed utter certainty in his identification of the defendant from the lineup, as well as in court. Under such circumstances, the failure to offer specific details of a defendant's appearance does not undermine an identification. Certainly, there is always a danger in permitting a single witness to

convict a defendant, but the law permits it, and this case does not share the weaknesses of those cases the defendant cites. This court has upheld identification testimony under less auspicious circumstances. See e.g. *People v. Campbell*, 252 Ill. App. 3d 624, 625 N.E.2d 130 (1993) (upholding conviction based solely on identification testimony of rape victim who identified defendant walking on the street two years after attack, despite fact that her earlier descriptions of the defendant differed from pictures of him taken at the time of crime).

The defendant asserts, finally, that Ciro was likely – given the day-long drinking – intoxicated and that this undermined the reliability of his identification; however, that Ciro was drinking merely reflects upon his credibility as a witness, a matter for the finder of fact. *Campbell*, 252 Ill. App. 3d at 629. In any event, there is no substantive evidence in the record to support the assertion that Ciro was intoxicated at the time of the crime. In fact, Officer Sierra testified that Ciro was able to drive without weaving from the scene where police stopped the victim's car. We conclude that Ciro's identification testimony was sufficiently reliable to support the jury's determination of guilt.

The defendant's second claim is that his trial counsel was ineffective for failing to introduce at trial the testimony of several alibi witnesses known by the defense. After the jury rendered its verdict, trial counsel filed a timely post-trial motion asserting various matters. Prior to resolution of this motion, trial counsel withdrew from further representation of the defendant. The defendant

was dissatisfied with his performance and retained substitute counsel, now defendant's appellate counsel. Substitute counsel filed a supplemental post-trial motion asserting the incompetence of trial counsel. The motion stated that numerous alibi witnesses were known and available to trial counsel and were in the courthouse during trial. These witnesses, some of whom had been identified in the defendant's pre-trial answer to the State's discovery request, had been prepared to testify that on the night of the murder, the defendant was with them at a family gathering in Lake Station, Indiana. The affidavits of three such witnesses were attached to the motion.

The trial judge heard argument on the motion and denied it without hearing from any witnesses. The three witnesses who had sworn affidavits were present in court during argument. In addition several other people who were prepared to testify were also present in court. During oral argument, substitute counsel elaborated on the allegations in the motion:

> "[P]rior to the trial of this case, Mr. Nelson Gonzales informed [trial counsel] that he was, in fact, in Lake County, Indiana, at Lake Point, Indiana, at the time of the incident; that he had picked up his child on Friday, the night before this incident. It was Father's Day weekend * * * there were a number of people in Indiana who he had spent the weekend with.
>
> * * *
>
> [Trial counsel] interviewed all of those witnesses. The majority of them came to the trial

> and spoke with [counsel] daily. They were outside the courtroom. [Counsel] informed them at one point they would be testifying, and that at some point he said that they would not be testifying."

The State responded that its investigators had interviewed all of the witneses, "and * * * as a result of those interviews, [trial counsel] probably in his infinite wisdom chose not to proceed to put these people on the stand in light of possible impeachment." The trial judge denied the defendant's motion on the ground that trial counsel's decision not to call the alibi witnesses was a matter of trial strategy rather than incompetence: "I was not aware of the scope of the prosecution's investigation here and that they had obtained statements from potential alibi witnesses would certainly shed additional light upon a decision of a lawyer not calling witnesses where he knows that there is a good likelihood of impeachment."

A defendant's right to effective assistance of counsel is guaranteed by the sixth amendment to the United States Constitution (U.S. Const. Amend VI), as well as by the Illinois Constitution. Ill. Const. 1970, art. I, sec. 2. In order to establish that counsel was ineffective, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that but for counsel's incompetence, the outcome of the defendant's trial would have been different. *Strickland v. Washington*, 466 U.S. 688, 694, 104 S. Ct. 2052 (1984); *People v. Albanese*, 125 Ill. 2d 100, 106, 531 N.E.2d 17 (1988).

The procedural posture in which the defendant presented his claim of ineffective assistance is unusual. Substitute counsel presented this claim as a part of a post-trial motion. Ordinarily, claims of ineffective assistance of trial counsel premised on the failure to call essential witnesses are best presented in a petition for post-conviction relief. Substitute counsel recognized this when he filed his motion to reconsider the denial of the post-trial motion entitling it "Defendant's motion to reconsider judgment, denial of post-trial, and sentence or, alternatively, petition for post-conviction relief."

Courts have wrestled with the dilemma of whether a claim of ineffective assistance of trial counsel raised on direct appeal is ripe for review. See *People v. Erickson*, 161 Ill. 2d 82, 96-108 (1994) (McMorrow J, dissenting) quoting *Guinan v. United States*, 6 F.3d 468, 473-74 (7th Cir. 1993) (Easterbrook, J., concurring):

> "Rules of procedure should be designed to induce litigants to present their contentions to the right tribunal at the right time. For ineffective assistance of counsel, the court of appeals on direct appeal is the wrong tribunal at the wrong time. * * * Failure to call essential witnesses might show both deficient performance and prejudice, but on direct appeal all we have is defendant's say-so that an uncalled witness was critical. To have any hope of success, the defendant must enlarge the record with affidavits establishing what testimony the witness would have provided if called, and demonstrate that his lawyer was actually aware of this potential testimony or grossly deficient in failing to find out about it."

Here, however, the claim of ineffective assistance is premised upon the failure of trial counsel to develop an alibi defense and to call witnesses that were tendered by the defense in its answer to discovery. Indeed, under the circumstances, had substitute counsel not presented the claim, it might be barred from consideration in a subsequent post-conviction petition by the doctrines of waiver and of *res judicata*. *People v. Green*, 218 Ill. App. 3d 71, 578 N.E.2d 169 (1991). Furthermore, substitute counsel enhanced the record by filing the affidavits of the various witnesses who were prepared to testify in the defendant's behalf. Thus, the concerns expressed by the dissent in *People v. Erickson* are not implicated here, and the claim is ripe for review.

We will reverse the trial judge's denial of a post-trial motion only upon a clear abuse of discretion. *People v. Dixon*, 256 Ill. App. 3d 771, 778, 628 N.E.2d 399 (1993). Although we do not know trial counsel's precise reasoning for not calling the witnesses – reasoning which could only be obtained in a post-conviction hearing (*People v. Flores*, 128 Ill. 2d 66, 538 N.E.2d 481 (1989); *People v. Goodloe*, 263 Ill. App. 3d 1060, 636 N.E.2d 1041 (1994)), we note that only serious errors in judgment, trial tactics or strategy justify a conclusion that trial counsel's performance was constitutionally deficient. *People v. Crosby*, 243 Ill. App. 3d 1083, 1087, 614 N.E.2d 199 (1993). Generally, counsel's decision whether to call particular witnesses is considered a matter or trial strategy and not a basis for assailing his competence. *People v. Moleterno*, 254 Ill. App. 3d 615, 622, 627 N.E.2d 129 (1993). Particularly where the uncalled witnesses swear affidavits stating that they had been in contact with defense counsel and had related all

of the information contained in the affidavits to counsel, our courts have viewed counsel's decision not to call these witnesses as a conscious trial strategy rather than oversight; hence, those decisions are not subject to challenge. *Moleterno*, 254 Ill. App. 3d at 622; *People v. Whittaker*, 199 Ill. App. 3d 621, 628-29, 557 N.E.2d 468 (1990). Indeed, when, counsel includes the affiants as potential witnesses in pre-trial notices, the presumption grows stronger that a subsequent decision not to call them was a matter of sound trial strategy. *People v. Consago*, 170 Ill. App. 3d 982, 524 N.E. 2d 989 (1988).

We note again that as part of his answer to discovery, trial counsel filed a notice of alibi defense asserting that at the time of the crime, the defendant was with his girlfriend. However, the affidavits supplementing the post-trial motion each averred that the affiant had told trial counsel that the defendant was with his son and the family in Lake Station, Indiana at the time of the crime. Thus, the affidavits, on their face, conflict with the defendant's alibi as asserted in trial counsel's response to the State's discovery request. Under the circumstances, we think the trial judge acted properly in concluding that the decision of counsel not to call these witnesses was a matter of trial strategy aimed at avoiding their probable impeachment.

Although the defendant cites numerous cases for the proposition that the failure to call alibi witnesses constitutes ineffective performance, these cases uniformly involve situations where counsel failed to even investigate a purported alibi. E.g. *People v. Coleman*, 267 Ill. App. 3d 895, 642 N.E.2d 821 (1994); *People v. Kluppelberg*, 257 Ill. App. 516, 628 N.E.2d 908 (1993); *People v. Truly*, 230 Ill.

App. 3d 948, 595 N.E.2d 1230 (1992). Here counsel raised an alibi defense. The content of the affidavits filed by substitute counsel demonstrate that trial counsel knew about these witnesses, knew the substance of their proposed testimony and knew that some were present at the courthouse during trial. Trial counsel clearly made a conscious choice not to call these witnesses after due consideration. Such a choice cannot serve as the basis for concluding that trial counsel's performance was objectively unreasonable under *Strickland*. Cf. *Truly*, 230 Ill. App. 3d at 954 (holding that where defense counsel made no contact with defense witnesses and made no effort to subpoena them, it is not a strategic decision to not call them in support of purported alibi defense). Accordingly, we conclude that the affidavits, in and of themselves, do not overcome the "strong presumption" in favor of trial counsel's competence. *People v. McPhee*, 256 Ill. App. 3d 102, 106, 628 N.E.2d 523 (1993).[1] The trial judge did not abuse his discretion in denying the defendant's post-trial motion raising trial counsel's incompetence.

For all of the foregoing reasons, the judgment of the trial judge is affirmed.

Affirmed.

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[1] In his reply brief, the defendant asserts that counsel was incompetent because he failed to disclose some of the alibi witnesses prior to trial in violation of Supreme Court Rule 413 (134 Ill. 2d R. 413), and that therefore they would not have been permitted to testify. As counsel failed to raise this point in his opening brief, it is waived under Supreme Court Rule 341(e)(7), and we perceive no plain error in this regard.

Leavitt, J., with Rakowski, J., and Zwick, P.J., concurring.